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IN THE UNITED STATES DISTRICT COURT.  
FOR THE DISTRICT OF ARIZONA

**United States of America,**

Plaintiff,  
Defendant.

No. CR 23-00908-TUC-SHR (LCK)

## **GOVERNMENT'S SUPPLEMENTAL SENTENCING MEMORANDUM**

16        The United States of America, through undersigned counsel, respectfully submits  
17      this supplemental memorandum to address questions this Court raised at the recent  
18      sentencing hearing held on December 16, 2024. (Doc. 156.) In short, this Court should:  
19      1) decline to apply the three-level guideline enhancement in U.S.S.G. § 3A1.1(a) (PSR ¶¶  
20      71-76); and 2) impose a 20-year sentence for the defendant's conviction in Count 6,  
21      consecutive to any other sentence, as required by 18 U.S.C. § 844(h)(1). (PSR ¶¶ 124, 126;  
22      at 26).

## **I. The U.S.S.G § 3A1.1(a) Guideline Enhancement Should Not Be Applied.**

The defendant was convicted of offenses arising from his setting fire to two historic churches in Douglas, Arizona, causing significant damage to the structures and impacting the victims and the community. For sentencing purposes, the PSR has grouped the defendant's convictions in Count 1 (arson of property used in interstate commerce) and Count 2 (obstruction of free exercise of religious beliefs by fire) under "Count Group 1"

1 because they involve the same victim, Saint Stephen's Episcopal Church, and two or more  
2 acts or transactions connected by a common criminal objective or constituting part of a  
3 common scheme or plan. (PSR at 2; PSR ¶ 62.) It grouped the defendant's similar  
4 convictions in Count 4 (arson of property used in interstate commerce) and Count 5  
5 (obstruction of free exercise of religious beliefs by fire), under "Count Group 2" because  
6 they involve the same victim, First Presbyterian Church. (PSR at 2; ¶ 63.)

7 Under both advisory guideline calculations for Count Group 1 and Count Group 2,  
8 the PSR recommended applying a three-level adjustment for hate crime motivation under  
9 U.S.S.G. § 3A1.1 (2024), which states:

10       **Victim Related Adjustment:** If the finder of fact at trial or, in the case of a  
11 plea of guilty or nolo contendere, the court at sentencing determines beyond  
12 a reasonable doubt that the defendant intentionally selected any victim or any  
13 property as the object of the offense of conviction because of the actual or  
14 perceived race, color, religion, national origin, ethnicity, gender, disability,  
15 or sexual orientation of any person, increase by 3 levels.

16 USSG §3A1.1(a). (PSR ¶¶ 67, 73.) For purposes of both Count Groups 1 and 2, the PSR  
17 applied the enhancement, as the evidence at trial showed that the defendant intentionally  
18 selected the victims because of the sexual orientation and gender of the church leaders.  
(Id.)

19 At the sentencing hearing, this Court questioned whether it was permitted to make  
20 the determination set forth in § 3A1.1(a) to trigger that adjustment. While the evidence at  
21 trial regarding the defendant's animus was clear, the answer in this case is no.

22 Based on the guideline's plain language, the "finder of fact at trial" in this case is  
23 the jury, not this Court, because the defendant was convicted following a jury trial. Thus,  
24 to trigger the application of this enhancement, the record would need to show that the jury  
25 implicitly or explicitly determined "beyond a reasonable doubt that the defendant  
26 intentionally selected any victim or any property as the object of the offense of conviction  
27 because of the actual or perceived race, color, religion, national origin, ethnicity, gender,

1 gender identity, disability, or sexual orientation of any person.” *Id.* See also *United States*  
 2 v. *Patterson*, 119 F.3d 609, 612 (2024) (“We apply the traditional rules of statutory  
 3 construction when interpreting the sentencing guidelines.”).<sup>1</sup>

4 Although the evidence at trial supports beyond a reasonable doubt that the defendant  
 5 had a hate crime motivation when he burned down the two churches in Douglas, Arizona,  
 6 the convictions in Counts 1, 2, 4, and 5 (Count Group 1 and Count Group 2) – to which the  
 7 three-level enhancement would apply – did not require the jury to implicitly or explicitly  
 8 “determine[] beyond a reasonable doubt that the defendant intentionally selected any  
 9 victim or any property as the object of the offense of conviction because of the actual or  
 10 perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability,  
 11 or sexual orientation of any person.” U.S.S.G. § 3A1.1(a).

12 First, the jury did not make this determination when it convicted the defendant of  
 13 the counts in Count Groups 1 and 2. The statute or jury instructions setting forth the  
 14 elements for arson of property used in interstate commerce, in violation 18 U.S.C. § 844(i))  
 15 (Counts 1 and 4) did not require the jury to make this type of § 3A1.1(a) finding beyond a  
 16 reasonable doubt to convict the defendant. Nor did the statute or jury instructions require  
 17 the jury to make this determination when convicting the defendant for obstruction of free  
 18 exercise of religious beliefs by fire, in violation of 18 U.S.C. §§ 247(a)(2) (Counts 2 and  
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21 <sup>1</sup> Although the unambiguous plain language of § 3A1.1(a) is dispositive and there is thus  
 22 no need to consult the application notes, *Patterson*, 119 F.4th at 612, the “background”  
 23 section of the Application Notes further confirms the guideline’s provisions, stating in  
 pertinent part:

24       “Subsection (a) reflects the directive to the Commission [by statute] to provide an  
 25 enhancement of not less than three levels for an offense when the finder of fact at  
 26 trial determines beyond a reasonable doubt that the defendant had a hate crime  
 27 motivation. . . . To avoid unwarranted sentencing disparity based on the method of  
 28 conviction, the Commission has broadened the application of this enhancement to  
 include offenses that, in the case of a plea of guilty or nolo contendere, the court at  
 sentencing determines are hate crimes.”

U.S.S.G. § 3A1.1 cmt. background.

1       5).<sup>2</sup> Thus, the jury here did not make a § 3A1.1(a) determination beyond a reasonable  
 2 doubt when convicting the defendant of the arson and obstruction crimes in Counts 1, 2, 4  
 3 or 5 because the statute and jury instructions did not require it.

4              Second, the jury did not make an explicit determination outside of the statutory  
 5 requirement. The jury did not receive an interrogatory or other type of special verdict form  
 6 asking it to make a § 3A1.1 finding beyond a reasonable doubt when convicting the  
 7 defendant of one or more of the above counts.

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9              2 For example, such an implicit jury determination occurred in *United States v. Armstrong*,  
 10 620 F.3d 1172, 1176 (9th Cir. 2010), in which the defendant was “convicted by a jury of  
 11 participating in a racially motivated assault against an African American man.” The first  
 12 count charged Armstrong and others with conspiring to injure, oppress, threaten, and  
 13 intimidate the victim’s free exercise of his right to use a place of public accommodation  
 14 free from interference based on race, in violation of 18 U.S.C. § 241; and the second  
 15 charged him with using force to willfully injure, intimidate, and interfere with the victim  
 16 because of his race and because he was enjoying the goods and services of an establishment  
 17 that serves the public, in violation of 18 U.S.C. §§ 245(b)(2)(F). *Id.* at 1174–75. The PSR  
 18 recommended a “victim related adjustment,” because “the jury determined beyond a  
 19 reasonable doubt that the defendant intentionally selected the victim because of the  
 20 victim’s race.” *Id.* at 1175. The Ninth Circuit affirmed the district court’s application of  
 21 the § 3A1.1 enhancement: “Although the jury was not asked to find that Armstrong  
 22 personally selected [the victim] in the first instance, it was asked to and did find that Smith  
 23 was the victim of Armstrong’s attack because of his race. That is sufficient reason to  
 24 impose the [3A1.1] enhancement.” *Id.* at 1176.

25              Another example of this type of implicit jury determination occurred in *United States v. Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999), where the defendants were convicted under  
 26 18 U.S.C. § 241 of conspiring to violate the civil rights of the victims as a result of their  
 27 involvement in cross burning. The district court rejected the defendant’s argument that, in  
 28 order for the district court to apply a § 3A1.1(a) enhancement, the jury was required to  
 make a special finding that he selected the victims because of their race. *Id.* “Although  
 section 241 is not on its face limited to racially motivated crimes, the jury instructions on  
 the section 241 count expressly incorporated language about the race of the victims. . . .  
 The jury found beyond a reasonable doubt that [one defendant] took part in the conspiracy  
 to intimidate the [victims] or interfere with their rights ‘on account of their race, color, or  
 national origin,’ . . . [which] provided a sufficient basis” to apply the enhancement in  
 § 3A1.1(a). *Id.*

1        Thus, this Court should decline the PSR's recommendation to apply the three-level  
2 hate crimes enhancement under § 3A1.1(a) for Counts 1 and 2 (Count Group 1), (PSR  
3 ¶ 67), and Counts 4 and 5 (Count Group 2). (PSR ¶ 73.)

4        Without the three-level guideline enhancement under § 3A1.1(a), the adjusted  
5 offense totals for Count Group 1 and Count Group 2 should be reduced from 27 (PSR  
6 to 24. (PSR ¶¶ 70, 76.) After applying the two-level multiple count upward adjustment  
7 in U.S.S.G. § 3D1.4, (PSR ¶ 79), this results in a combined adjusted offense level for both  
8 groups (and total offense level) of 26, rather than 29. (PSR ¶¶ 79-80.) The advisory  
9 guideline range that applies, based on an offense level of 26 and a criminal history category  
10 I, is 63-78 months, rather than the 87-108 months' range currently cited in the PSR. (PSR  
11 ¶ 125; at 26).

12       The PSR recommended concurrent terms of 108 months for Counts 1, 2, 4, and 5,  
13 the top of the then-applicable guideline range, to run consecutive to all other counts. (PSR  
14 at 26.) The government continues to recommend 108 months because an upward variance  
15 from the advisory guideline range under *United States v. Booker*, 543 U.S. 220 (2005), is  
16 warranted and the sentence is reasonable under 18 U.S.C. § 3553(a). The evidence at trial  
17 overwhelming demonstrated that the defendant was motivated by the type of animus that  
18 the § 3A1.1(a) enhancement was designed to address when he set fire to both churches.  
19 *See United States v. Armstrong*, 620 F.3d 1172, 1176 (9th Cir. 2010) (stating that “[t]he  
20 purpose of [§ 3A1.1(a)] is to punish those who have a hate crime motivation and to deter  
21 future hate crimes”). Although the proposed enhancement should not apply here, the PSR  
22 still correctly concluded that the defendant intentionally selected his victim because of the  
23 gender and sexual orientation of the church leaders. A sentence of 108 months is still  
24 appropriate because it justifiably addresses the defendant's hate crimes motivation for the  
25 offenses in Count Group 1 and Count Group 2 and is a reasonable sentence under 18 U.S.C.  
26 § 3553(a), including to address the seriousness of the crimes and the other factors the  
27 government identified in its initial sentencing memorandum. Thus, the government still  
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1 respectfully requests that this Court impose a 108-month concurrent sentence for the  
2 defendant's convictions in Counts 1, 2, 4 and 5, to run consecutive to all other counts.

3       **II. This Court Should Sentence The Defendant To 20 Years On Count 6,**  
4       **Consecutive To Any Other Sentence, As Required By 18 U.S.C. § 844(h)(1).**

5           The defendant was convicted of two counts of using a fire to commit a federal felony  
6 (Counts 3 and 6), in violation of 18 U.S.C. § 844(h)(1). (PSR at 2.) The conviction in  
7 Count 3 carries a 10-year consecutive sentence under that statute. (PSR at 2; ¶ 124.) As  
8 the PSR also notes, Count 6 requires a term of 20 years “based on a second or subsequent  
9 conviction,” citing 18 U.S.C. § 844(h)(1), and “must be imposed consecutively to any other  
10 counts.” (PSR ¶¶ 124, 126.) The PSR has thus recommended a sentence of 10 years  
11 consecutive for Count 3, and 20 years consecutive for Count 6. (PSR at 26.)

12          At the sentencing hearing, this Court questioned whether the 20-year mandatory  
13 consecutive sentence for Count 6 is legally correct. It is and the Court should impose the  
14 mandatory consecutive sentence.

15          The PSR accurately stated that a 20-year consecutive sentence applies to Count 6  
16 based on 18 U.S.C. § 844(h)(1), which provides in pertinent part: “In the case of a second  
17 or subsequent conviction under subsection, such person shall be sentenced to imprisonment  
18 for 20 years.” The conviction in Count 6 is a “second or subsequent” § 844(h)(1)  
19 conviction. Thus, under the statute’s plain language, it is appropriate – and statutorily  
20 required – for this Court to impose a consecutive 20-year sentence on Count 6, which must  
21 be consecutive to any other count. 18 U.S.C. § 844(h)(1).

22          The First Step Act cases addressing prior convictions under 18 U.S.C. § 924(c) do  
23 not alter this result. In 1997, § 924(c)(1) required a minimum sentence of five years for  
24 use of a firearm “in relation to any crime of violence,” and a sentence of thirty years “if the  
25 firearm is a machinegun, or a destructive device.” *Id.* See *United States v. Merrell*, 37  
26 F.4th 571, 573 (9th Cir. 2022) (quoting Section 924(c)). “In the case of [a defendant’s]  
27 second or subsequent conviction under this subsection,” the statute then mandated a  
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1 sentence of twenty years, or a life sentence “if the firearm is a machinegun, or a destructive  
 2 device.” *Id.* At the time, the qualifying “second or subsequent conviction” could arise  
 3 from the same trial and indictment as the “first” conviction. *Merrell*, 37 F.4th at 573 (citing  
 4 *Deal v. United States*, 508 U.S. 129, 132-33 (1993)). And, multiple sentences imposed  
 5 under § 924(c)(1) were required to be consecutive, or “stacked.” *Id.* (citing 18 U.S.C.  
 6 § 924(c)(1) (1996)).

7 As noted above, Section 844(h) provides for a 10-year mandatory minimum penalty  
 8 for a first violation and a 20-year mandatory minimum penalty “[i]n the case of a second  
 9 or subsequent conviction under” the subsection. 18 U.S.C. § 844(h). That statutory  
 10 language mirrors the previous language of 18 U.S.C. § 924(c), which was modified in 2018  
 11 under the First Step Act to allow for the enhanced penalty only for a “violation of this  
 12 subsection that occurs after a prior conviction under this subsection has become final.”  
 13 First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5222-23 (2018). That change  
 14 meant that first-time violators would not receive the enhanced penalties when convicted of  
 15 multiple counts of § 924(c) arising out of the same course of events. The First Step Act’s  
 16 revision of § 924(c) also abrogated the *Deal* rule for purposes of § 924(c), which, as noted  
 17 earlier, allowed enhancements based on convictions arising out of the same indictment and  
 18 trial. *Deal*, 508 U.S. at 136–37.

19 But significantly, Congress did not change the statutory language of § 844(h).  
 20 Indeed, the only place § 844 is mentioned in the First Step Act is to prohibit § 844 offenders  
 21 from receiving certain BOP time credits. 132 Stat. 5199, 5201. Unlike § 924(c), § 844(h)  
 22 still provides for enhanced penalties for and “second or subsequent conviction[s].”  
 23 Consequently, the rule of *Deal* still applies to § 844(h), as it did before the First Step Act.  
 24 See *United States v. Tolliver*, 730 F.3d 1216, 1228-29 (10th Cir. 2013) (“[T]he district court  
 25 sentenced Defendant to ten years’ imprisonment on the first § 844(h)(1) conviction and a  
 26 consecutive term of twenty years’ imprisonment on the second § 844(h)(1) conviction,  
 27 each to run consecutively to the sentence for the two § 844(i) convictions.” The Tenth  
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1 Circuit rejected the defendant's challenge to this sentence. "We therefore see no principled  
 2 reason to depart from the Supreme Court's holding that the phrase 'second or subsequent  
 3 conviction' applies to convictions for offenses tried in a single proceeding." (citing *Deal*,  
 4 508 U.S. at 133 n. 1) ("Findings of guilt are necessarily arrived at 'successively in time,'  
 5 even in a single proceeding . . . so that multiple convictions occurring in the same  
 6 proceeding can indeed be 'second or subsequent' for purposes of section 924(c).")

7 Thus, under the mandatory provisions of § 844(h)(1), the defendant must receive a  
 8 10-year sentence on Count 3 and a 20-year sentence on Count 6, consecutive to each other  
 9 and any other sentence, as the PSR has correctly noted. (PSR ¶¶ 124-26.) Count 6 is a  
 10 "second or successive" § 844(h)(1) conviction to the § 844(h)(1) conviction in Count 3.  
 11 These two convictions can arise from the same indictment. See *Deal*, 508 U.S. at 133 n.1;  
 12 *Tolliver*, 730 F.3d at 1228-29; *United States v. Peoples*, 41 F.4th 837, 838 (7th Cir. 2022)  
 13 (affirming the district court's denial of compassionate release in a case where although the  
 14 § 924(c) sentences had been affected by the First Step Act, the consecutive sentences for  
 15 his § 844(h)(1) counts arising from the same indictment would be unchanged). The First  
 16 Step Act and its impact on § 924(c) convictions is inapposite in this case.

### 17 III. Conclusion

18 Although this Court should not apply the guideline enhancement in § 3A1.1(a), it  
 19 should still sentence the defendant to 108-month concurrent terms for Counts 1, 2, 4, and  
 20 5, because an upward variance is warranted, and the sentence is reasonable. In addition,  
 21 the Court should impose a 10-year sentence for Count 3, and a 20-year sentence for Count  
 22 6, to run consecutive to each other, and consecutive to the concurrent sentences for Counts  
 23 1, 2, 4, and 5. This would result in a total sentence of 30 years (360 months) plus 108  
 24 months, resulting in a total sentence of 468 months, as the PSR recommended. (PSR at  
 25 26.)

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1 Respectfully submitted this 23rd day of December, 2024.  
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8

9 **CERTIFICATE OF SERVICE**

10 I hereby certify that on this same date, I electronically transmitted the attached  
11 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
12 Notice of Electronic Filing to the following CM/ECF registrant:

13 Trevor Hill  
14 *Stand-by counsel for defendant*

15 I further certify that on this date I mailed a copy of the attached document to the defendant,  
Eric Ridenour.

16 *s/C. Covington*  
17 U.S. Attorney's Office